(3)

No. 91-1026

Supreme Court, U.S.
FILED
MAR 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EAST ALABAMA HEALTH CARE AUTHORITY d/b/a
EAST ALABAMA MEDICAL CENTER,
Petitioner,

vs.

AUBURN MEDICAL CENTER, INC.
AND ALABAMA STATE HEALTH PLANNING AGENCY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

---

PETITIONER'S REPLY MEMORANDUM

LEE H. SIMOWITZ
Counsel of Record
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1608

IVAN WOOD
ERIN E. LUNCEFORD
BAKER & HOSTETLER, MCCUTCHEN BLACK
2100 Texas Commerce Tower
600 Travis
Houston, Texas 77002
(713) 236-0020

JOHN V. DENSON
SAMFORD, DENSON, HORSLEY, PETTEY, MARTIN & BARRETT
P.O. Box 2345
Opelika, Alabama 36803-2345
(205) 745-3504

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
A. This Court has jurisdiction	1
B. No further administrative remedies were available to East Alabama	5
1. The federal district court's order prevented East Alabama from seeking a Fair Hearing	6
2. SHPDA's governing statute and rules made a Fair Hearing unavailable to East Alabama	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)	8
Barr v. City of Columbia, 378 U.S. 146 (1964)	3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	2
Eddings v. Oklahoma, 455 U.S. 104 (1982)	2
Ex parte Dean, 447 So.2d 733 (Ala. 1984)	4,5
Hathorn v. Lovorn, 457 U.S. 255 (1982)	2,3,4,5
Methodist Homes for the Aging v. Stewart, No. 2900438, 1992 Ala. Civ. App. LEXIS 14 (Ala. Civ. App. Jan. 10, 1992)	9
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	2
Springhill Hospitals, Inc. v. Alabama State Health Planning Agency, 549 So.2d 1348 (Ala. Civ. App. 1989)	8
STATUTORY PROVISIONS:	
Ala. Code § 22-21-275(14)	8
RULES:	
Ala. Rules of Appellate Procedure, Rule 39(j)	3,4
Ala. Rules of Appellate Procedure, Rule 40	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1026

EAST ALABAMA HEALTH CARE AUTHORITY d/b/a
EAST ALABAMA MEDICAL CENTER,
Petitioner,

vs.

AUBURN MEDICAL CENTER, INC.
AND ALABAMA STATE HEALTH PLANNING AGENCY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

---

PETITIONER'S REPLY MEMORANDUM

Petitioner East Alabama Health Care Authority ("East Alabama") submits the following memorandum in reply to the Brief of Respondent in Opposition ("Opp.") filed by respondent Auburn Medical Center, Inc.

A. This Court has jurisdiction.

Respondent Auburn argues that this Court has no jurisdiction to entertain East Alabama's petition because East Alabama's constitutional argument was first asserted in an application for rehearing to the

Alabama Supreme Court, and because that application was stricken without opinion by the Alabama Supreme Court. Auburn is mistaken; East Alabama's federal constitutional claim was appropriately presented and preserved, and this Court has jurisdiction to entertain it.

Contrary to Auburn's argument, this Court can and does take jurisdiction of questions first presented to the highest court of a state on an application for rehearing. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975) ("Appellants clearly raised the issue of the constitutionality of § 26-9901 in their motion for rehearing in the Georgia Supreme Court."); *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) ("[I]n his petition to the Court of Criminal Appeals for a rehearing, Eddings specifically presented the issue and at some considerable length.").[1] Questions initially raised on rehearing may be considered if " 'the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.' " *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.15 (1982), *quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

Nor is jurisdiction foreclosed because the Alabama Supreme Court struck East Alabama's application for rehearing.

---

[1] East Alabama set out its constitutional arguments specifically and in detail in its application for rehearing to the Alabama Supreme Court following that Court's order quashing the writ of certiorari. The relevant portions of East Alabama's application for hearing are reproduced in the Supplemental Appendix ("S.App.") to this Reply Memorandum as Appendix A.

> We have recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question. Our decisions, however, stress that a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." . . . State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply even-handedly to all similar claims.

Hathorn, 457 U.S. at 262-63 (footnote omitted), *quoting Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). The Alabama Supreme Court's striking of East Alabama's rehearing application constituted neither the "strict" nor the "regular" invocation of a procedural rule.

The proceedings before the Alabama Supreme Court were, to say the least, unusual. The Alabama Supreme Court initially granted East Alabama's petition for a writ of certiorari, only to quash that writ, after full briefing on the merits, as improvidently granted. App. 10a. Three justices of the Alabama Supreme Court dissented and filed a dissenting opinion. East Alabama filed an application for rehearing which the Alabama Supreme Court struck "pursuant to Rule 39, Alabama Rules of Appellate Procedure," again over the dissent of three justices. App. 17a.

Rule 39 of the Alabama Rules of Appellate Procedure, however, does not address the situation of petitions for writs of certiorari that are *granted* and then quashed, but solely petitions that are initially *denied*. ("No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied." Rule 39(j), Ala. R. App. P., Sup-

plemental Appendix B at 6a.) Moreover, Rule 40, governing applications for rehearing, contains no limitation on the types of orders for which rehearing may be sought. The Alabama Rules of Appellate Procedure thus do not by their terms foreclose applications for rehearing of an order quashing a writ of certiorari, and East Alabama is aware of no articulation by the Alabama Supreme Court of a general rule against consideration of such applications for rehearing.[2]

On the contrary, the Alabama Supreme Court has not only entertained, but *granted*, an application for rehearing in circumstances procedurally identical to East Alabama's. *Ex parte Dean*, 447 So.2d 733 (Ala. 1984).[3] In *Hathorn v. Lovorn*, 457 U.S. 255, 264 (1982), the Court held that the Mississippi Supreme Court's failure to adhere to a putative procedural rule in similar circumstances "persuades us that the Mississippi Supreme Court is not 'strictly or regularly' following a procedural rule precluding review of issues raised for the first time in a petition for rehearing." The same conclusion is compelled here by the fact that the Alabama Supreme Court entertained and

---

[2] In fact, only *after* East Alabama's rehearing application was denied, Rule 39(j) of the Alabama Rules of Appellate Procedure was amended to foreclose applications for rehearing when a writ of certiorari is quashed. S. App. 6a. This amendment confirms that no such rule was in effect when East Alabama's application was pending.

[3] In *Ex parte Dean*, the Alabama Supreme Court stated: "This court granted the writ of certiorari. However, on 16 September 1983, the writ was quashed as improvidently granted. The case is now before us on application for rehearing. That application is granted." *Id.* at 734.

granted a rehearing application in *Ex parte Dean* in circumstances indistinguishable from this case.

Moreover, the Alabama Supreme Court struck East Alabama's rehearing application by a four to three majority. The three dissenting justices must therefore have believed not only that East Alabama's rehearing application was meritorious, but also that the application was permissible under the Alabama Rules of Appellate Procedure. Where the justices of a state supreme court themselves disagree regarding the application of the supposedly dispositive procedural rule, the only possible conclusion is that the court has "avoided the federal question by invoking an inconsistently applied procedural rule." *Hathorn*, 457 U.S. at 265 n.15. Such a rule is not an independent and adequate state ground, and therefore cannot prevent review of a federal question by this Court.

B. No further administrative remedies were available to East Alabama.

Respondent Auburn does not dispute most of the key facts upon which East Alabama's petition is based. For example, Auburn acknowledges that at least since November 1983, the state health plan for Lee County, Alabama has shown an excess of hospital beds, which means that the agency decision below has permitted Auburn to pursue the construction of an unnecessary hospital under a certificate of need that has been obsolete for nearly a decade. Opp. 6-7. Auburn also acknowledges (and strains to explain away) the findings of the trial court: (1) that its certificate of need was obtained through manipulation of the timing of revisions to the state health plan; (2) that an Auburn principal hired the son of a key state agency decisionmaker; and (3) that the decisionmaker whose son

was employed by the Auburn principal removed an agency employee from the case who had criticized Auburn's proposal. Opp. 14-16.[4] The Alabama Court of Civil Appeals' misapplication of the exhaustion of administrative remedies doctrine, however, shielded these events from judicial review.

1. The federal district court's order prevented East Alabama from seeking a Fair Hearing.

Auburn argues that the United States District Court for the Middle District of Alabama did not enjoin all further administrative proceedings before the State Health Planning and Development Agency ("SHPDA") because the federal district court stated that the "only action enjoined by this Court" was the "power to conduct another reconsideration hearing." App. 35a. The federal district court's order cannot be read so narrowly; *all* further administrative proceedings were clearly enjoined.

The federal district court itself described the scope of its injunction as forbidding "further administrative review," and permitting only "state judicial review." App. 35-36a. SHPDA clearly understood the injunction as depriving it of all "authority to terminate, withdraw, or suspend the CON issued." App. 48a. Acting accordingly, SHPDA issued the Auburn CON

---

[4] Citing no record support, Auburn attempts to dismiss the trial court's findings as the supposed product of "obvious bias." Opp. 19. There is no basis for questioning these findings, however, on Auburn's lame rationalizations. Auburn acknowledges, for example, that the agency official whose son was employed by an Auburn principal instructed the agency staff that he wanted no "bad staff report" for the Auburn project, but contends that the remark was a "joke" referring to the Auburn University football team. *Id.* at 15.

without even allowing the statutory 30-day period for seeking a Fair Hearing to elapse. *See generally* Certiorari Petition 19. And the three dissenting justices of the Alabama Supreme Court also understood the federal court injunction as making all further administrative remedies unavailable:

> Here, SHPDA was *enjoined* from reconsidering Auburn Medical Center's CON; had it done so, SHPDA would have been in contempt of the federal court .... Once the United States District Court held SHPDA's January 10, 1984, decision to be a final one, East Alabama' only recourse was to appeal to the [state] circuit court.

App. 14a (emphasis in original).

The federal district court thus intended to, and did, order a halt to all additional administrative review; any attempt by East Alabama to seek a Fair Hearing would have been not only futile, but at peril for contempt sanctions. East Alabama was therefore trapped between the federal district court order, which commanded the issuance of the Auburn CON with no further administrative consideration, and the decision of the Alabama Court of Civil Appeals, which unfairly penalized East Alabama for not seeking an administrative remedy that the federal district court had forbidden SHPDA to grant.

2. SHPDA's governing statute and rules made a Fair Hearing unavailable to East Alabama.

Auburn argues that East Alabama should have requested a Fair Hearing in 1988, after the federal district court injunction compelled SHPDA to issue the Auburn CON, because East Alabama had previously requested a Fair Hearing in 1984 following

SHPDA's original approval of the Auburn CON. Opp. 23-25. East Alabama's attempt to gain a Fair Hearing in 1984, however, has no bearing on the availability of that procedure four years later.

The short and complete answer to Auburn's argument is that the federal district court injunction blocked East Alabama's ability to seek a Fair Hearing in 1988. No such injunction stood in its way in 1984. Moreover, the state did not act on East Alabama's 1984 Fair Hearing request; East Alabama withdrew that request after SHPDA rescinded the Auburn CON, thus mooting the issue. In fact, had East Alabama's 1984 Fair Hearing request not been withdrawn, the state would have rejected it. The applicable statute provides only for a "[r]equest for fair hearing *by the applicant* . . . ." Ala. Code § 22-21-275(14) (emphasis added). SHPDA, contrary to the principle of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), denied East Alabama competing applicant status throughout the proceeding.[5] Subsequent judicial interpretation has made clear that a non-"applicant," the status to which SHPDA confined East Alabama, cannot invoke the Fair Hearing procedure. "[T]he appellant who is seeking review is not an applicant; therefore, that statutory review [under § 22-21-275(14)] is not available to appellant." *Springhill Hospitals, Inc. v. Alabama State Health Planning Agency*, 549 So.2d 1348, 1350 (Ala. Civ. App. 1989).

Moreover, SHPDA had taken the position (until recently reversed by the Alabama Court of Civil Appeals) that a Fair Hearing request by an unsuc-

---

[5] Indeed, the reviewing circuit court found that SHPDA had erred in denying East Alabama competing applicant status. App. 21a.

cessful competing applicant would not stay the issuance of a CON to the victorious applicant. *Methodist Homes for the Aging v. Stewart*, No. 2900438, 1992 Ala. Civ. App. LEXIS 14, at *2 (Ala. Civ. App. Jan. 10, 1992). SHPDA's interpretation, which was in effect in 1988, thus would have rendered a Fair Hearing request by East Alabama doubly useless, because (i) SHPDA erroneously refused to grant East Alabama competing applicant status, and (ii) even a Fair Hearing request by a competing applicant would not have caused SHPDA to stay issuance of Auburn's CON.[6]

In short, even if the federal district court injunction had not forbidden SHPDA to grant East Alabama's Fair Hearing request, SHPDA's rules and the governing certificate of need statute precluded a non-"applicant" such as East Alabama from obtaining that remedy, and SHPDA's interpretation of the effect of a Fair Hearing sapped it of any value. The decision of the Alabama Court of Civil Appeals therefore deprived East Alabama of due process by making judicial review dependent upon the exhaustion of an administrative remedy that did not exist, either legally or practically.

---

[6] In *Methodist Homes*, the Alabama Court of Civil Appeals excused the disappointed applicant from exhausting its administrative remedy by filing a written request for a Fair Hearing because that applicant had been orally informed by a SHPDA official in a telephone conversation that the request would not stay the issuance of the competitor's CON. 1992 Ala. Civ. App. LEXIS at *8-10. *Methodist Homes* stands in stark contrast to this case, where the Court of Civil Appeals held that not even the order of a federal district court forbidding further administrative proceedings relieved East Alabama of the requirement to make a futile attempt to invoke the Fair Hearing procedure.

Conclusion

East Alabama's Petition for a Writ of Certiorari to the Alabama Supreme Court should be granted.

Respectfully submitted,

LEE H. SIMOWITZ
Counsel of Record
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1608

IVAN WOOD
ERIN E. LUNCEFORD
BAKER & HOSTETLER,
McCUTCHEN BLACK
2100 Texas Commerce Tower
600 Travis
Houston, Texas 77002
(713) 236-0020

JOHN V. DENSON
SAMFORD, DENSON, HORSLEY,
PETTEY, MARTIN & BARRETT
P.O. BOX 2345
Opelika, Alabama 36803-2345

March 1992

APPENDIX

SUPPLEMENTAL APPENDIX A

Excerpt from
East Alabama Health Care Authority's
Application for Rehearing

AUBURN MEDICAL CENTER, INC.

v.

EAST ALABAMA HEALTH CARE AUTHORITY

Alabama Supreme Court Docket No. 1900604

* * * * *

ARGUMENT

A. The Decision as it Stands Completely Ignores the Prior Federal Court Order and in Doing so, is not only Manifestly Unjust, but in Violation of East Alabama's Constitutional Rights to Due Process Pursuant to the 14th Amendment, by Requiring East Alabama to Attempt to Exhaust an Administrative Remedy that was Never Available.

The dissenting opinion of this Honorable Court recognized the unique situation in which East Alabama finds itself:

> We find the present situation falls outside the traditional requirement that administrative remedies must be exhausted prior to judicial review because SHPDA was precluded by the federal court from acting on any fair hearing request that East Alabama might have filed.

Ex parte East Alabama Health Care Authority d/b/a East Alabama Medical Center, No. 1900604 (July 26, 1991), dissenting opinion, page 7. By quashing the writ granting certiorari and thereby reinstating the court of appeals' decision holding that East Alabama had failed to exhaust its administrative remedies by not requesting a fair hear-

ing, the Alabama courts have violated East Alabama's constitutional rights under the 14th Amendment to due process under the law.

As is discussed above in the relevant facts section, the federal court order of November 15, 1988 ordered the issuance of the CON to Auburn and precluded further administrative review of the CON review Board's January 10, 1984 decision granting Auburn its CON. Furthermore, SHPDA *actually* issued the CON to Auburn on November 28, 1988, *13 days* after the federal court order, thus depriving East Alabama of any rights it may have possessed to request a fair hearing, which was required to be requested within 30 days, or by December 14, 1988. *Ala. Code* § 22-21-275(14) (1975). Alabama law dictates that no CON can be issued until there is a final agency decision, and a fair hearing is an administrative remedy *only* available before a decision is deemed to be final. *Ala. Code* § 22-21-275(13), (14) (1975).

This situation, while unique, is exceptionally similar to the position faced by the plaintiff in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930). The facts are parallel in that the plaintiff was appealing to the U.S. Supreme Court from a decision of the Missouri Supreme Court denying the plaintiff relief based upon its failure to exhaust its administrative remedies prior to proceeding to judicial review. *Brinkerhoff-Faris Trust & Savings Co.*, 50 S. Ct. at 453. There, the possibility that the plaintiff had a remedy before an administrative agency, the State Tax Commission, was never suggested by anyone in the litigation until the Missouri Supreme Court issued its opinion. *Id.* By this time "it was too late for the Plaintiff to avail itself of the newly found remedy." *Id.*

In the case at hand, East Alabama's failure to exhaust its administrative remedies through a request for fair hearing was *never* even suggested until Auburn filed its brief

to Court of Civil Appeals. By that time, the 30-day timetable within which to request a fair hearing had long since passed. *Ala. Code* § 22-21-275(14) (1975). In *Brinkerhoff-Faris*, the Supreme Court held that:

> If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, *the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it.*

Id. 50 S. Ct. at 454. (emphasis added.) This refusal to consider the merits of plaintiff's complaint in light of the absence of any other remedy constituted a violation of plaintiff's due process rights under the 14th Amendment. *Id.* The Supreme Court further held that while it is up to:

> the state courts to determine the adjective as well as substantive law of the state, they must, in so doing accord the parties *due process of law*. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinerhoff-Faris, 50 S. Ct. at 454-455. (emphasis added.)

It has long since been the law that it is a denial of due process guaranteed by the 14th Amendment when state courts deprive a party of its substantive right without also providing it adequate notice and an opportunity to defend

its rights. *Shelley v. Kraemer*, 334 U.S. 1, 16, 68 S. Ct. 836, 843 (1948). Specifically,

> . . . due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 377, 91 S. Ct. 780, 785 (1971). A due process violation is accomplished under color of state law when the state judiciary cuts off a party's substantive rights in the course of construing state law. *Brinkerhoff-Faris*, 50 S. Ct. at 454.

Pursuant to the Alabama Certificate of Need Statute, *Ala. Code* § 22-21-275(14) (1975), the Alabama Administrative Procedure Act, *Ala. Code* § 41-22-20 (1975), and § 410-1-7-.02(22)(d) of the *SHPDA Rules and Regulations* (1979), East Alabama has a valid right to appeal the issuance of the CON to Auburn. In addition, pursuant to the *Ashbacker* doctrine discussed below, East Alabama has a constitutional and statutory right to have its CON application comparatively reviewed with that of Auburn. The SHPDA denied East Alabama this right to comparative review, and it was not until the judicial review before Judge Phelps that the constitutional right to comparative review was provided to East Alabama. It is this right, along with the right to judicial review, which is now being taken away by the Court of Civil Appeals' decision.

There is no doubt that East Alabama's right to judicial review is a "property" interest which is protected from deprivation under the 14th Amendment. The Supreme Court has consistently held that "property interests" include those rights which are created or explained by state law. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972). Specifically,

> . . . A person's interest in a benefit is a "property interest" for due process purposes if there are such rules . . . that support this claim of entitlement to the benefit and that he may invoke at a hearing.

Perry v. Sindermann, 408 U.S. at 601, 92 S. Ct. at 2699.

The effect of the Court of Civil Appeals' decision that East Alabama failed to exhaust its administrative remedies by requesting a fair hearing, is to deny East Alabama the right to contest the issuance of the CON to Auburn. This is the result, like that of the plaintiff in *Brinkerhoff-Faris*, because the administrative remedy was not thought (by any party, including SHPDA) to exist in December 1988, and pursuant to Alabama CON law, could not exist today. Thus, the refusal of the Alabama Supreme Court and the Court of Civil Appeals to review the merits of the instant case has resulted in East Alabama being deprived of its property rights to judicial review in violation of the 14th Amendment's due process protections, pursuant to *Brinkerhoff-Faris*, and the other cases cited above.

SUPPLEMENTAL APPENDIX B

Rule 39(j), Alabama Rules of Appellate Procedure

No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied.

Rule 39(j), Alabama Rules of Appellate Procedure (Amended November 21, 1991)

No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied, quashed, or stricken.